IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 850 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GHELABHAI KACHARABHAI PARMAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR IMRAN PATHAN FOR MM TIRMIZI for Appellant(s) : 1,
MR HM PRACHCHHAK APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 24/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM N. MEHTA)

1. The appellant has preferred this appeal

under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment dated 24-06-1999 passed by the learned Addl. Sessions Judge, Court No.25, Ahmedabad in Sessions Case No. 312 of 1996 convicting him for the offence punishable under Section 302 of the I.P. Code and sentencing him to undergo life imprisonment and also convicting him for the offence punishable u/s 37(1) read with 135 (1) of the Bombay Police Act and sentencing him to undergo simple imprisonment of one month and to pay fine of Rs.100/-, in default thereof, to undergo simple imprisonment of seven days. The appellant is acquitted of the offences punishable u/s 323 – 504 of the I.P. Code.

2. In brief the prosecution case is that on 30-4-1996 there was quarrel on the play ground of Santram Colony in Gomtipur area of Ahmedabad between the sons of the accused and the complainant for playing cricket and the son of the accused beat the son of the complainant Jasiben. Therefore when the complainant came to rebuke, the accused gave abuses to her. On the same day at about 3-15 p.m. when deceased, Babubhai Khanabhai the husband of the complainant came to rebuke the accused, he went inside the house and came with iron angle (rod) and tried to assault deceased Babubhai.

Complainant Jasiben sustained injury on her left cheek as she tried to intervene. In the same transaction the accused inflicted one blow of iron angle (rod) on the chest of deceased Babubhai Khanabhai which resulted into his death.

3. On the basis of complaint lodged by Jasiben Babubhai wife of deceased Babubhai offence was registered as I – CR No. 88 of 1996 before Gomatipur Police Station for the offences punishable u/s 302, 323, 294 (B) of the I.P. Code and u/s 135 (2) of the Bombay Police Act and investigation was started. During the investigation dead body of Babubhai Khanabhai was sent for postmortem. Inquest panchanama, panchanama of scene of offence and panchnama of discovery of muddamal iron angle (rod) were drawn. The accused was arrested and was sent to the hospital for medical examination.

4. On completion of the investigation, charge sheet was laid before the Metropolitan Magistrate, Court No.10, Ahmedabad for the offences punishable u/s 302, 323, 294(B) of the I.P. Code and u/s 135 (1) of the Bombay Police Act against the accused. As the offence was triable by the Court of Sessions, the case was committed to the City Sessions Court, Ahmedabad and it was registered as Sessions Case

No. 312 of 1996. Learned Addl. Sessions Judge, Court No.25, Ahmedabad framed charge Exh.2 against the accused for the offences punishable u/s 504, 323, 302 of the I.P. Code and u/s 135(1) of the Bombay Police Act and the same was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. The prosecution adduced evidence to prove the charge. On closure of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against him in the evidence. The accused in his further statement recorded under Section 313 of the Cri. Procedure Code denied having committed the offence and stated that after taking him into the custody he was sent to the hospital but his complaint was not registered and the investigating agency itself wrote the complaint and obtained his signature. He further explained that his son Girish aged about 12 to 15 years is physically handicapped on account of polio and his wife is also physically handicapped on account of injury on spinal cord and he did not go to quarrel but deceased Babubhai, his wife Jasiben, their son Ketan and Raman Khana brother of deceased pelted stones on him. At that time deceased Babubhai came with iron angle and was drunk. While coming to his house to attack him Babubhai

fell down and sustained injury on his chest by the iron angle.

5. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge found the accused guilty for the offence punishable under Section 302 of the I.P. Code and u/s 37 (2) read with 135 (1) of the Bombay Police Act and sentenced him as mentioned hereinabove and acquitted him for the offence punishable u/s 323 and 504 of the I.P. Code. Therefore, the accused has challenged the said judgment in this appeal.

6. Mr. Imrankhan Pathan for Mr. M.M. Tirmiji for the appellant submitted that the prosecution failed to prove that there was motive behind the incident. He also submitted that on account of stone pelting by the deceased and others there was quarrel and the deceased who was drunk came with an iron angle to attack the appellant but fell down and was injured by the iron angle and hence the appellant was not responsible for the injury. He also submitted that according to the prosecution the motive behind the offence is quarrel with regard to playing cricket between the sons of the appellant and the complainant but the son of the appellant was physically handicapped and he was not in a position to

play and therefore there was no question of quarrel between the two boys as alleged by the prosecution. Therefore, there was no motive for the alleged offence, and hence, the appellant has been falsely implicated. He also submitted that panch witnesses have not supported the prosecution case and the witnesses who have supported the prosecution case are the relatives of the deceased and therefore the trial Court could not have based conviction on the testimonies of such interested witnesses. He further submitted that if the court is not inclined to accept that the appellant was not involved in the offence, alternatively on account of sudden quarrel the alleged incident took place wherein only one injury was caused to the deceased and the appellant had no intention to cause death of the deceased and therefore the case would fall under exceptions 1 and 4 to Section 300 of the I.P. Code, and at the most the appellant could be said to have committed the offence of culpable homicide not amounting to murder and therefore conviction is required to be altered to the offence punishable u/s 304 Part-II of the I.P. Code.

7. Learned A.P.P. Mr. H.M. Prachchhak appearing for the respondent – State submitted that the

evidence of the eye witnesses establishes the involvement of the appellant in the offence. Simply because the witnesses are relatives of the deceased, their evidence cannot be thrown away. He also submitted that the medical evidence indicates that the injury was caused on the vital part of the body and therefore the appellant caused injury with premeditation. Therefore the learned trial Judge was justified in recording conviction against the appellant for the offence punishable u/s 302 of the I.P. Code. Hence, no interference is warranted in the judgment of the trial court and the appeal is required to be dismissed.

8. We have perused the judgment of the trial court and record and proceedings of the case.

9. In order to prove that death of Babubhai Khanabhai was homicidal in nature, the prosecution examined P.W. 2 Dr. Surendra C. Yadav at Exh. 8. The witness deposed that the external and internal injuries found on dead body were recorded in Column No. 17 and Column No. 20 respectively in P.M. Notes Exh. 9. He further deposed that external injury No. 1 corresponding to the internal injuries was in the ordinary course of nature sufficient to cause death. He further deposed that such

injuries were possible by muddamal article No.1 iron angle and cause of death was due to shock and haemrrohage following injuries to the vital organs of body. In the cross-examination, the witness denied that the injuries were possible on account of forceful fall on the iron angle or alike substance or on account of fall from edged 'otla'. The witness further deposed that one injury was found on the chest of the deceased. The prosecution produced postmortem Notes at Exh. 9 which indicate the external as well as internal injuries found on the dead body. It also indicates that death was caused on account of shock and haemrrohage following injuries to the vital organs of body. In view of this evidence, the prosecution proved beyond reasonable doubt that death was homicidal in nature. The defence has not been able to elicit that death was accidental on account of fall on iron angle or from edged 'otla' as suggested in the cross-examination of the witness.

10. The prosecution examined P.W. 1 Jasiben Babubhai who is the wife of the deceased at Exh. 6. She deposed that on 30-4-1996 she went to purchase grocery and when she returned, her son Ketan informed her that Girish son of the accused beat him, and therefore, she went to scold the parents of Girish. She further deposed that the

accused was drunk and started giving abuses and hence she returned home but despite that the accused continued to give abuses from his house. She further deposed that somebody called her husband who went to scold the accused who got angry and asked her husband whether he wants to fight and went inside the house and came with an iron angle. She further deposed that the accused came running with the iron angle as her husband was returning and hit the iron angle below her right eye as she tried to catch hold of the accused. She further deposed that her husband stood at a 'pan' shop and the accused went there and threw the iron angle at him which hit on her husband's chest. In the cross-examination, the witness admitted that relation between her family and the accused's family were cordial before the incident. She denied that she, her husband and children pelted stones at the house of the accused and at that time her husband was holding iron angle. She also denied that the accused was injured and bleeding as she threw stone at him. She denied that the iron angle was hit on the chest of her husband as he fell down on account of push when he went to hit the accused with the iron angle.

11. The prosecution produced F.I.R. at Exh.18

wherein the P.W. 1 Jasiben reiterated the incident. It appears from the evidence of P.W. 1 Jasiben Babubhai Exh. 6 that before the incident relations between the families of the deceased and the appellant were cordial. It also appears from the evidence that prior to the incident on the same day there was quarrel between the sons of two families about playing cricket. On account of such quarrel the complainant went to the house of the accused to scold the accused but she returned as the accused allegedly gave abuses. Thereafter deceased Babubhai was called who went to scold the accused which resulted into occurrence of the incident. The evidence of this witness indicates that she has denied about the stone pelting and injury to the appellant. The medical evidence indicates that the appellant had sustained injuries and a complaint was filed by him against the deceased and this witness. In view of this it becomes clear that there was quarrel and the incident ensued. In view of this, it is difficult to believe that the deceased died on account of of fall as suggested in the cross-examination. On reappreciation of evidence of this witness, it becomes clear that there was no premeditation and the incident occurred on account of sudden quarrel and in the heat of passion the appellant went inside his house and came out with an iron

angle and threw it towards the deceased without any intention to hit on a particular part of the body of the deceased. The appellant could not have anticipated that the iron angle would hit on the chest of the deceased. In view of this, in our view the appellant inflicted the injury without any intention to cause death and did not take undue advantage.

12. The prosecution examined P.W. 3 Ketan Babubhai who is the son of the deceased Babubhai Khanabhai at Exh. 10. He deposed that he was beaten by Girish and two other children and her mother went to tell the accused's son but the accused gave abuses as he was drunk. He further deposed that his father was standing at 'pan' shop and the accused gave iron angle blow on his chest and his mother was also hit by the iron angle. In the cross-examination, the witness deposed that the wife of the accused had called his father and admitted that on account of stone pelting the accused sustained injury on his head. In view of this evidence, it appears that there was stone pelting and the appellant was injured on his head in the stone pelting. It also becomes clear that there was quarrel between the children of the two families about playing cricket and as the son of the complainant was beaten by the son of the accused, she went

to the house of the accused to scold him and quarrel ensued between the two families which resulted into the incident wherein the appellant was also injured.

13. The Injury Certificate Exh.29 indicates that the appellant was treated for his injuries in Shardaben Hospital, Ahmedabad. On conjoint reading of evidence of P.W. 1 Jasiben and P.W. 3 Ketan, it becomes clear that on account of quarrel between the sons of the two families, the complainant went to scold the appellant and there was stone pelting wherein the appellant sustained injury which infuriated him and the incident ensued. Therefore, it becomes clear that the incident happened on account of sudden quarrel between the family members of the complainant and the appellant.

14. The prosecution also examined P.W. 4 Ramanbhai Khanabhai who is the brother of the deceased at Exh. 11. But the witness turned hostile and not supported the prosecution case. The evidence of this witness does not carry the prosecution case any further.

15. The prosecution examined P.W. 5 Shakuntalaben Dhanjibhai alleged eye witness at Exh. 12. The witness deposed that on the day of

incident she was taking meal in the house and she came out on hearing loud shouting but thereafter she went inside the house as her child was crying. She also deposed that the accused gave iron angle blow to Babubhai on his chest. In the cross-examination she stated that she did not see Jasiben, her three children and Babubhai pelting stones on the house of the accused and she did not see that the accused was bleeding from his head. The evidence of this witness does not inspire confidence. According to her evidence, she was present at the time of the incident but she did not notice that the appellant was bleeding from his head and that Jasiben and her family members pelted stones at the house of the accused. The evidence of this witness is contrary to the evidence of P.W. 3 Ketan Babubhai Exh. 10. Therefore, the evidence of this witness creates doubt about its trustworthiness. In our view, the witness is not telling the truth, and therefore, the evidence of this witness cannot be relied upon.

16. The prosecution examined P.W. 6 Amit Babulal Parmar who is the son of deceased Babubhai at Exh. 13. But the witness has denied that his mother and brothers pelted stones on the house of the appellant and also denied that his father got instigated and ran with the iron angle to hit the appellant but lost balance and fell on the

iron angle and sustained the injuries. The witness also deposed that he did not notice the appellant bleeding from his head. The evidence of this witness is contrary to the evidence of P.W. 3 Ketan Exh. 10 and Injury Certificate Exh. 29 in respect of stone pelting and injury to the appellant. It appears that the witness has denied the stone pelting and injury to the appellant only with a view to rule out a probable defence that the appellant committed the offence as there was quarrel. But in our view, the evidence clearly indicates that the incident took place on account of quarrel and there was no premeditation.

17. The prosecution examined panch witnesses to prove panchanama of scene of offence, panchanama of discovery of muddamal iron angle and inquest panchanama. But, panchas turned hostile and did not support the prosecution case. However, the panchanamas have been proved through Investigating Officer P.W. 16 Ranjitsinh Exh. 37. The defence has not been able to elicit from the evidence of this witness that the investigation was not properly carried out.

18. The inquest panchanama Exh. 25 indicates that the deceased sustained one injury on left side of his chest. This injury is reflected in P.M. Notes Exh. 9. Therefore, it is clear that the

deceased had sustained only one injury on the vital part of the body.

19. The prosecution examined P.W. 13 Dr. Sudhir Ratilal Joshi who treated the appellant at Exh. 28. In the cross-examination the witness stated that general history of injury given by an injured is being recorded in the case papers. The witness admitted that medical certificate Exh. 29 does not indicate the history given by the injured. He also deposed that according to the injured he had sustained injury on account of stone pelting at 3-00 p.m. on 30-4-1996. The injury certificate at Exh. 29 indicates the following injuries.

(1) C.L.W. 2 cm x 0.2 cm, irregular bone deep on right parietal region near parietal eminence about 5 cm. away from midline.

(2) Abrasion on left leg, lower part, anterior aspect 2 x 1 cm size.

(3) Tendon on right lower chest posterior aspect.

X-Rays : Skull < AP |No fracture seen.
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20. The history of the injuries given by the patient recorded in the medical case papers of the hospital at Exh. 30 indicates that the appellant complained that he was beaten by stone by the opposite party at 3-15 p.m. on

30-4-1996. The prosecution examined P.W.15 Babuji Khalaji the Police Head-Constable of Gomtipur Police Station at Exh. 33 who recorded Vardhi Exh.34 received from L.G. Hospital, Ahmedabad. This evidence indicates that Chief Medical Officer of L.G. Hospital, Ahmedabad gave a Vardhi to police that Babubhai Khanabhai was brought to the hospital for treatment as his neighbour Ghelabhai had given a blow with sharp pointed weapon on left side of chest and is declared dead at 16-05 hrs. The Vardhi appears to have been given at 16-20 hrs. In view of this evidence, it becomes clear that immediately after the incident the injured was taken to the hospital for treatment where the name of the assailant and nature of the weapon used in the attack were disclosed. The entry made in station diary Exh. 35 indicates that offence was registered against the appellant at 17-35 hrs. on 30-4-1996. The evidence of P.W. 15 Babuji also indicates that the appellant also went to the police station around 3-00 to 3-30 p.m. On the same day to lodge a complaint but his compliant was not recorded by police. In view of this evidence, it appears clear that during the incident the appellant also sustained injuries and he went to the police station to lodge a complaint but his compliant was not recorded but subsequently when he was apprehended he was sent to hospital and his complaint Exh.40

was recorded.

21. The prosecution examined P.W. 17 Kanjibhai Laljibhai who had recorded the complaint filed by the appellant at Exh. 45. The witness deposed that he had recorded the complaint Exh. 45 and the complainant (appellant) had signed the complaint in his presence. In the cross-examination, the witness deposed that the complaint was given around 3-00 or 3-30 O'clock in the noon and he had given 'yadi' to go to the hospital. He denied that he did not record the complaint as narrated by the complainant. The prosecution produced the said complaint at Exh. 45. It indicates that it was filed against P.W. 1 Jasiben and deceased Babubhai Khanabhai at 16-00 hours on 30-4-1996 for the incident that occurred at 15-15 hours on the same day. It appears from the averments made in the complaint that P.W. 1 Jasiben and deceased Babubhai gave kick blows to the complainant (appellant) as he tried to persuade them. In view of this evidence, it becomes clear that the appellant also sustained injuries from P.W. 1 Jasiben and her family members before the incident and on account of that the incident occurred. The evidence of P.W. 13 Dr. Sudhir Joshi Exh. 28 and Medical Certificate Exh. 29 also indicate that the appellant was treated for the injuries. In view of this evidence, it clearly emerges that

as there was quarrel between the children of the appellant and the deceased, the appellant was called by complainant Jasiben and there was altercation between them. Thereafter, there was stone pelting which caused injuries to the appellant and it infuriated the appellant so he went inside the house, took the iron angle and threw it towards the deceased Babubhai which hit on his chest and it resulted into fatal injury. Therefore, it appears that the appellant was deprived of the power of self control on account of quarrel with the deceased and stone pelting which caused the injuries and the appellant retaliated and threw the iron angle towards the deceased which hit on his chest which resulted in the fatal injury. It is clear that murder was committed without premeditation in a sudden quarrel and in heat of passion. It also appears that the appellant committed offence without having taken undue advantage. As discussed earlier, inquest Panchanama Exh. 25 indicates that only one blow was inflicted to the deceased. The evidence of the witnesses also indicates that only one blow was given to the deceased which unfortunately resulted into his death. Therefore, the appellant did not act in a cruel or unusual manner. Hence, in our view, the appellant could not have been convicted for the offence of murder of deceased Babubhai.

22. On reappreciation of the evidence we are of the view that the appellant inflicted injury on vital part of the deceased with knowledge that such injury is likely to cause death but without any intention to cause death of Babubhai. Therefore, the learned trial Judge was not justified in recording the conviction of the appellant for the offence punishable u/s 302 of the I.P. Code. Hence, conviction recorded by the trial Judge for the offence of murder u/s 302 of the I.P. Code is required to be altered to Section 304 Part-II of the I.P. Code.

23. As we have altered the sentence from Section 302 to 304 Part-II of the I.P. Code, the learned advocate for the appellant was heard on the question of sentence. Learned advocate for the appellant submitted that the appellant has already undergone imprisonment for more than seven years as he was in jail since the date of conviction i.e. 24-6-1999. He also submitted that considering the family back ground and the manner in which the offence is committed the period of imprisonment already undergone by the appellant should be taken as just and proper punishment for the offence punishable u/s 304 Part-II of the I.P. Code.

24. Considering the overall evidence and submissions made by the learned counsel for the

parties, we are of the view that there was quarrel between the children and as the elders intervened the unfortunate incident happened. It appears that there was no previous enmity between the two families and their relations were cordial. It also appears that the appellant belongs to poor strata of society having a physically handicapped son. Considering all these aspects, in our view, just and proper sentence would be the period of imprisonment already undergone by the appellant for the offence punishable u/s 304 Part-II of the I.P. Code.

25. As regards the conviction recorded by the trial court for the offence punishable u/s 135 of the Bombay Police Act, the prosecution produced notification at Exh. 32. However, in our view, iron angle cannot be said to be a weapon as described in the notification. Therefore, the conviction recorded for the offence u/s 37 (1) read with Section 135 (1) of the Bombay Police Act cannot sustain and is required to be set aside.

26. For the foregoing reasons, the appeal is partly allowed and conviction of the appellant recorded by the judgment and order dated 24-06-1999 passed by the learned Additional Sessions Judge, Court No.25, Ahmedabad in Sessions Case

No. 312 of 1996 for the offence punishable u/s 302 of the I.P. Code is altered from Section 302 of the I.P. Code to Section 304 Part-II of the I.P. Code and the appellant is directed to undergo sentence of rigorous imprisonment for the period already undergone by him and the conviction recorded for the offence punishable u/s 37 (1) read with Section 135 (2) of the Bombay Police Act is set aside. The muddamal be disposed of as directed by the trial Court.

(A.L. Dave, J.)

(Bankim N. Mehta,J.)

/JVSatwara/